

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-2030

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
LYMAN T. SHEPARD,

Petitioner-Appellant,

-against-

LARRY TAYLOR, Warden,
Metropolitan Correctional Center,
and MAURICE SIGLER, Chairman,
United States Parole Commission,

Respondents-Appellees.
-----x

Docket No. 77-2030

Docket No. 77-2031

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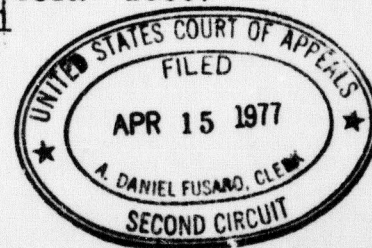
BRIEF FOR APPELLANT

ON APPEAL FROM TWO ORDERS
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES COURT OF APPEALS
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LARRY TAYLOR, Warden, :
Metropolitan Correctional Center, :
and MAURICE SIGLER, Chairman, :
United States Parole Commission, :
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Respondents-Appellees. :
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Docket No. 77-2030

Docket No. 77-2031

BRIEF FOR APPELLANT

ON APPEAL FROM TWO ORDERS
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the denial of parole to appellant based on the Parole Commission's guidelines is illegal and unconstitutional because the Parole Commission's guidelines are inconsistent with the Youth Corrections Act.
2. Whether appellant was denied his right to a due process hearing because the Commission denied him his statutory right to a subpoena for evidence and witnesses and his due process right to present evidence and witnesses in his own defense.
3. Whether the writ must be granted because the Commission failed to disclose the entire contents of the file before the hearing examiners.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from two orders of the United States District Court for the Southern District of New York, one (The Honorable Charles H. Tenney) entered on January 24, 1977; the second (The Honorable Richard Owen) entered on February 25, 1977, each denying a petition for writ of habeas corpus challenging the procedures and practices of the United States Parole Commission.

Timely notices of appeal from each order were filed and, by order dated March 15, 1977, this Court consolidated the appeals.

The Legal Aid Society, Federal Defender Services Unit, continues as assigned counsel under the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

In July 1972, petitioner-appellant Lyman T. Shepard was sentenced in the United States District Court for the District of Texas as a youthful offender to a term of up to six years' imprisonment (18 U.S.C. §5010(b)) for interstate transportation of a stolen vehicle, in violation of 18 U.S.C. §2312. On April 18, 1974, he was released on parole. On December 17, 1974, he

was sentenced by a judge of the Supreme Court of the State of New York, New York County, to a term of up to four years in prison for attempted robbery in the second degree committed while on parole.

On January 10, 1975, while appellant was incarcerated at the Clinton Correctional Facility at Dannemora, New York, serving his state term of custody, the United States Board of Parole lodged against him a parole violation detainer.

Hoping to improve his chances of rehabilitation, on June 20, 1975, Shepard requested withdrawal of the detainer. The Parole Board refused to grant a hearing, and no disposition was made of the detainer.*

*In November 1975, Shepard filed a pro se petition for writ of habeas corpus in the United States District Court for the Northern District of New York, asserting that a delay in his parole revocation hearing would impair his ability to present evidence against an unfavorable decision and prevented him from participating in rehabilitative and educational programs at the state institution. The district judge denied the writ.

On appeal to this Court (Kaufman, Ch.J.; Smith and Mansfield, C.JJ.), the order of the district court was reversed (541 F.2d 322). This Court concluded that the delay in the revocation hearing deprived Shepard of due process. The decision ordered a hearing in the district court to determine whether a delay in the revocation hearing resulted in the loss of mitigating evidence, and also ordered that, in the event mitigating evidence was not lost, a parole revocation hearing be held under 18 U.S.C. §4214(b), with full and timely disclosure of the evidence and a statement of the factual findings and reasons underlying the decision reached by the Commission.

The Government filed a jurisdictional statement in the Supreme Court. Although the Government did not seek a stay of the proceedings on remand, the district judge, after assigning counsel to represent Shepard, agreed to hold the hearing ordered by this Court in abeyance pending a decision by the Supreme Court on the jurisdictional statement. The Supreme Court vacated the judgment and remanded the case to this Court for

B. Appellant is released from New York State custody, but
is "lost" en route to MCC

By letter of December 1, 1976, counsel advised the Commission that appellant was to be released by New York State on December 15, 1976. Because of the pending litigation with the Solicitor General's office, described supra at 3, fn., the hearing was set to be held at the Metropolitan Correctional Center ("MCC") (memorandum of December 10, 1976, from Chairman of Parole Commission to Regional Commissioner Nardoza, part of appellant's parole file,* E to the separate appendix to appellant's brief).

By letter of December 15, 1976, counsel was notified that a parole revocation hearing pursuant to 18 U.S.C. §4214 had been set by the Commission for January 11, 1976 (the letter is part of appellant's parole file).

(Footnote continued from the preceding page)

reconsideration in light of Moody v. Daggett, 97 S.Ct. 276 (1976). 45 U.S.L.W. 3488 (January 18, 1977). Briefs on remand were filed on March 16, 1977, pursuant to an order of this Court, and the case is now sub judice.

*This letter implicitly contradicts the affidavit of David O'Connor dated January 14, 1977 (Document #9 to the Record on Appeal in 77 Civ. 83), that the timing and location of the hearing were planned for the convenience of counsel rather than because the case was already under judicial scrutiny.

On December 15, 1976, appellant was released on parole by the New York State Parole Board, to a program of education and work. The release date was approximately 10 days prior to his legal release date, to enable him to register for school at the Clinton Community College in Plattsburgh, New York, which was to take place during the week of January 17, 1977 (petition in 77 Civ. 387, Document #2 to the Record on Appeal; affidavit of Gordon J. Johnson, Esq., dated January 6, 1977, to petition in 77 Civ. 83, Document #2 to the Record on Appeal; see also Parole Hearing Summary, part of appellant's parole file, and O to the separate appendix). Shepard was taken into custody by United States marshals on that date. From December 15 to 22, 1976, counsel did not know the whereabouts of Shepard. On December 22, 1976, counsel received a letter from him stating that the deputy marshals had told him they were awaiting instructions regarding when to transfer him to another facility and which facility to transfer him to, and that he did not know when he might be moved.

On December 22, 1976, counsel spoke by telephone numerous times to representatives of the Bureau of Prisons, the Parole Commission, and the marshal's office, advising each that he was unable to confer with appellant and to prepare his defense case, since Shepard had not been brought to New York City, the site of his hearing. He did the same by letter. (The letter is part of appellant's parole file.) On December 23, 1976, counsel was finally informed by the Southern District marshal's

office that Mr. Shepard would be in New York City on December 27 or 28, 1976.*

Appellant telephoned counsel on January 3, 1977, stating that he had arrived at MCC in the early evening on December 30, 1976, but was unable to reach counsel until January 3 (affidavit of Gordon Johnson dated January 6, 1977, to petition in 77 Civ. 83, Document #2 to the Record on Appeal).

C. The Parole File

By letter of December 2, 1976 (F to appellant's separate appendix), pursuant to counsel's request of November 20, 1976, the Parole Commission forwarded to counsel for appellant various documents in appellant's file. There were three letters from officials at Clinton Correctional Facility. One, dated August 6, 1975, was written by the Superintendent, stating appellant's length of custody, maximum expiration date, conditional release date, and date of scheduled appearance before the State parole board.

The second letter was dated June 25, 1976, from a senior parole officer at Clinton, advising the federal Parole Commission that a warrant was lodged against appellant, and asking whether federal custody was planned.

*The delay in returning appellant was confirmed in the affidavit of David O'Connor, who indicated that the reason for the problem was that the General Counsel's office had communicated with the wrong marshal's office (Document #2 to the Record on Appeal in 77 Civ. 83).

The third letter, dated November 14, 1976, was written by S.W. Haley, appellant's corrections counselor (Appendix G, and attached to affidavit of Gordon Johnson dated January 14, 1977, Document #10 to Record on Appeal in 77 Civ. 83), and states:

... As in the past, resident Shepard at this time maintains a record of excellent institutional adjustment. He currently occupies a clerical position in the Hospital Clinic, and is described as a responsible and efficient worker. Lyman has also attended our evening college program, and having completed two full semesters, maintains a perfect grade point average of 4.0.

In the opinion of this writer, Lyman has undergone significant personal growth while incarcerated and has learned to direct his energies toward viable self-improvement programs. Despite numerous obstacles, his overall attitude has been positive.

Also in the file were reports from federal parole or correctional officials, dated October 8, 1973, and November 28, 1973; and from Shepard's parole officer, dated December 27, 1974. From these reports, all psychiatric diagnosis is deleted.*

*The December 2, 1976, letter of transmittal of the parole file from the Acting Parole Commissioner states:

The letter from Probation Officer Falhenburg dated December 24, 1974 was excised since it contained a psychiatric evaluation which, if released, could lead to a serious disruption of institutional programs and be harmful to Mr. Shepard or others. In addition the material deleted from the three Bureau of Prisons documents was excised for the same reasons as stated above.

Pursuant to instructions given by the Commission in its December 2, 1976, letter, on December 30, 1976, counsel appealed the failure to disclose the deleted portions of the federal parole and correctional reports to the Deputy Attorney General (Appendix H). By telephone call of January 5, 1977, general counsel to the Parole Commission advised that the deleted portions from Shepard's parole officer's report stated that Shepard was a "psychopathic personality who would continue to act in an antisocial manner disregarding rules and regulations and who would not profit from counselling or therapy" (affidavit of Gordon Johnson dated January 14, 1977, at 4, Document #10 to the Record on Appeal, 77 Civ. 83).*

*Shepard's parole file indicates that there was a telephone conversation between Shepard's counsel and the Commission's general counsel, but the contents of that conversation is deleted from the file.

D. Counsel provides the Commission with information

On December 1, 1976, counsel sent two letters to the Commission. One, from the Coordinator of the Inmate Higher Education Program to the New York State Parole officer, and dated September 21, 1976, spoke about appellant's education experience, specifically disclaiming an opinion on any other "circumstance." It reported that appellant had been enrolled at Clinton Community College since Fall 1975, had taken 21 credits, and had earned a 4.0 average. The later stated that Shepard was enrolled for the Fall 1976 term, and that there was no problem about his being accepted for the Spring 1977 term if he were paroled (Appendix I; attached to Document #10 to the Record on Appeal, 77 Civ. 83). The additional letter was one of congratulations from an official at Clinton Community College for Shepard's having achieved a 4.0 average (Appendix J; attached to Document #10 to Record on Appeal, 77 Civ. 83).

E. Counsel unsuccessfully seeks a Parole Commission subpoena for necessary documents and witnesses

On January 5, 1977, after having conferred with Shepard on January 4, 1977, counsel made an oral request of David O'Connor, a post-release analyst for the Parole Commission, that, pursuant to 18 U.S.C. §4214(a)(2), the Parole Commission issue a subpoena duces tecum for Shepard's New York state institutional and parole file, and for a subpoena ad testificandum for S.W. Haley, the

caseworker who supervised Shepard at Clinton Correctional Facility. New York State would not voluntarily make the documents available, and the witness notified Shepard that he would not attend voluntarily (see affidavit of Gordon Johnson dated January 6, 1977, attached to petition in 77 Civ. 83, Document #2; see also memorandum of Parole Commission, dated February 5, 1977, which has been excised and is part of appellant's parole file). Mr. O'Connor advised counsel that the Commission's manual authorized issuance of subpoenas only for evidence adverse to the parolee (Petition in 77 Civ. 83, Document #2 to the Record on Appeal).

The request for subpoenas was repeated in a telephone call to counsel from Mitchell B. Dubick, an attorney with the special litigation section of the Justice Department, who stated that it was necessary to call Fred Martin, general counsel to the Parole Commission. Mr. Martin advised that the request would have to be made in writing to Joseph Nardoza, the Regional Commissioner, and to Mr. O'Connor (affidavit of Gordon Johnson, dated January 6, 1977, attached to petition in 77 Civ. 83). The letters were forwarded by special delivery, urging the subpoena under the statute, as well as pursuant to Morrissey v. Brewer, 408 U.S. 471 (1971) (Appendix K; attached to petition in 77 Civ. 83, Document #2 to the Record on Appeal).

Based on information received from appellant, counsel advised the Commission that he believed the records and testimony of the witnesses would establish that appellant had demonstrated

excellent institutional progress, adjustment, and rehabilitation. Counsel sought the institutional file, psychiatric reports prepared by Dr. Reyes, and the presence of Mr. Haley.

On January 6, 1977, Mr. O'Connor stated that the request would not be considered until the letter was received, and that it had not yet arrived (Affidavit of Gordon Johnson, dated January 6, 1977, attached to petition in 77 Civ. 83, Document #2 to the Record on Appeal).

On January 7, Mr. O'Connor received the letter. However, Mr. Nardoza, the person "with sole authority to issue such subpoenas," would not be in the office until January 10, 1977, and no decision would be made at least until then (affidavit of David O'Connor, dated January 14, 1977, Document #14 to the Record on Appeal, 77 Civ. 83).

F. Counsel files a petition for writ of habeas corpus

By order to show cause dated January 7, 1977, appellant sought a petition for writ of habeas corpus. Shepard asserted that he would be unable to have a fair hearing without the requested records and witness, and that the refusal to issue the subpoena was in conflict with Morrissey v. Brewer, 408 U.S. 471 (1972), and Gagnon v. Scarpelli, 411 U.S. 778, 792 (1973), as well as with the statute, and was inconsistent with Moody v. Daggett, 97 S.Ct. 276 (1976). Shepard sought dismissal of the warrant and his return to parole status.

G. The request for the subpoena is denied

The parole file shows that on January 10, 1977, a memorandum was written to Mr. Nardoza by Mr. O'Connor. The memorandum (Appendix L) was excerpted, with the omitted portions remaining undisclosed, and then lists seven documents:

- (1) Progress report from Superintendent dated 8-6-75 (see supra at 7);
- (2) Letter from Shepard dated 8-7-75;
- (3) N.Y. State Parole Officer Williams' letter dated 6-25-76 (see supra at 7);
- (4) Correction Counselor Haley's Progress Report dated 10-14-76 (Shepard's caseworker) (see supra at 7);
- (5) Clinton Comm. College official's letter dated 7-22-76 (see supra at 9);
- (6) Institution Education Coordinator's letter of 9-21-76 (see supra at 9); and
- (7) N.Y.C. Probation Office Pre-sentence Report dated 10-21-74.

It concludes:

According to our procedures, witnesses other than adversarial may be requested to appear and a subpoena issued if the witness's testimony is necessary for proper disposition or will not appear voluntarily or provide a written statement. There is no mention of a subpoena for records.

I suggest a subpoena is not appropriate in this situation. [*]

*This document is part of appellant's parole file, but was

Counsel was notified by telephone on January 10, 1977, that the request for subpoenas had been denied.

On January 12, 1977, the letter denying the subpoenas was received by counsel. In the letter (Appendix N), the Commission, without any reference to the fact that Shepard had been inaccessible to counsel from December 15, 1976, to January 3, 1977, and of the fact that counsel's request for subpoenas had been made to Parole Commission officials on January 5, 1977, noted that no request had been made until January 6, 1977. The denial was based on the following:

... [T]he Commission already has a total of six letters from Haley, Mr. Shepard, and you documenting Mr. Shepard's institutional performance at the Clinton Correctional Complex, which will be considered by the Examiners at the hearing. I would note that written reports similar to those received in Mr. Shepard's case are traditionally considered by the Commission in determining a prisoner's program performance and adjustment. Moreover, the question of institutional performance or participation in rehabilitative programs is only one of many factors that are considered to determine whether revocation is warranted.

Your request for a subpoena under 28 C.F.R. Section 2.51(a2), while indicating that Mr. Haley would not voluntarily appear, did not set forth a factual basis as to why an adequate written statement from Mr. Haley in lieu of his appearance could not be obtained, but, rather, merely

(Footnote continued from the preceding page)

not sent to counsel until February 24, 1977, after the parole revocation hearing and the district court proceedings. This document is significant for revealing the Commission's use of information undisclosed to Shepard, both in the parole revocation hearing (see Section M, infra, at 24) and to deny the subpoenas.

concluded that, "The nature and complexity of his anticipated testimony" required his personal appearance. In our view, this approach would require that witnesses and documents be subpoenaed in virtually every case where an alleged violator serves a term of imprisonment in another state or federal facility prior to his revocation hearing. As stated above, the normal procedure for determining institutional performance is to review written progress reports.

Ironically, the letter concludes:

... I would like to advise you that the Commission will receive any information from Mr. Shepard or others at the revocation hearing regarding his institutional performance, as well as any additional letters, affidavits, or other documentary evidence relating to that or any other facet of Mr. Shepard's case.

H. The Parole Revocation Hearing

Immediately prior to the parole revocation hearing, and again when it began, counsel requested that both attorneys representing Shepard -- Gordon Johnson and Phylis Skloot Bamberger -- be permitted in the hearing room. The request was denied "to keep it as simple as possible and to keep the room as clear as possible" (Transcript of Parole Revocation Hearing at 5);* affidavit of William Quirk, the hearing examiner, Document # to the Supplemental Record on Appeal, 77 Civ. 83; Parole Hearing Summary at 1).** Counsel also requested that an official court reporter from the Southern District court

*The transcript is annexed as Appendix N.

**The Parole Hearing Summary is annexed as Appendix O.

reporters' office be permitted to record the testimony. Counsel explained that the tapes of parole hearings are often partially or substantially inaudible. This request was also denied after reference to a rule in an undisclosed manual* (see affidavit of Gordon Johnson of January 14, 1977, Document #6 to the Record on Appeal, 77 Civ. 83; Parole Hearing Summary (Appendix O) at 1; Transcript (Appendix N) at 4-5).

The hearing examiners were advised that counsel had sought to present the New York State institutional and psychiatric reports, but were denied subpoenas to do so. The examiners offered to adjourn the hearing, but were advised that a delay would prejudice Shepard's New York State parole plans by making it impossible to register for the spring semester at Clinton Community College, and further, that a postponement did not make the production of documents any more likely after the denial (Transcript (Appendix N) at 6).

During the course of the hearing, after examining the files before them, the examiners stated that the only New York State institutional records or documents contained therein were the one-page letter from Mr. Haley (Appendix G); the two letters concerning Shepard's college achievements (Appendices J and K); and a short note from Peter Smith, a general contractor from

*Mr. Quirk attested to the good quality of the tape. It is requested that the Court listen to the tape to confirm that it is difficult, if not impossible, to understand large portions of it. Counsel for Shepard volunteered to prepare a transcript of the hearing, and the resulting document is annexed as Appendix N. The difficulties in transcribing are apparent.

Plattsburgh, New York, which guaranteed Shepard housing and employment upon his release, a letter that had been submitted by Shepard.

The examiners advised counsel that no other institutional records or papers from New York State authorities regarding Shepard's institutional performance were before them (Transcript (Appendix N) at ²⁸⁻²⁹~~30-31~~).

Shepard was asked what Mr. Haley would say if he were present. Shepard replied that, for the whole time he was at Clinton, he knew Mr. Haley; that he felt sure Mr. Haley would give him a very good overall appraisal; that he got nothing but good feedback from everyone with whom he was in contact at the institution, including the parole board. When the hearing examiner asked if the rest of the record requested in the subpoena would reflect the same information, Shepard replied that he was not sure what the report would consist of, although he believed that the contents of the file would be favorable. Shepard stated that there were reports he preferred to have the examiners see, such as the one made by the psychiatrist for whom Shepard had worked. Shepard also stated that the impression he got from the State Parole Board was also that the record was fairly impressive. This was confirmed, the examiners noted, by the decision of the State Board to release Shepard early to a program, rather than to the federal detainer (Transcript (Appendix N) at ^{22,}~~26-29~~); affidavit of Gordon Johnson dated January 14, 1977, Document #10 to the Record on Appeal, 77 Civ. 83).

At the hearing, Shepard explained the circumstances leading to the commission of the new crime (Transcript (Appendix N) at 10-18). Shepard's two sisters testified to their belief that their brother was now more mature than he had been, and that he had changed in his attitudes (Transcript (Appendix N) at 30-36).

The Parole Hearing Summary (Appendix O) prepared by the examiners indicates that they considered Shepard's present psychiatric status without, however, the assistance of any reports prepared by the state institution.

There is some indication that subject has had emotional problems in the past and he says that this is true because it goes back to the time of his childhood, particularly with his father's suicide, and the fact that there are eight siblings in the family which at that time was hard pressed to provide emotional support and the care that they all needed. He seem[sic] to have overcome this particular weakness in his make-up and counsel indicated that there is information in the records at the Clinton Correctional Facility that would indicate he has matured considerably. Shepard himself says that he was in Quasi counselling while at Clinton and the panel itself notes that Mr. Haley, the erstwhile Correctional Counselor, who was not subpoenaed, states in his letter of October 14, 1976, that in his opinion Lyman has undergone significant personal growth while incarcerated and has learned to direct his energies towards viable self improvement programs. This he has done despite numerable obstacles and is lauded because of his consistency in sticking to his program, particularly as a full time student. Shepard, himself, has had a good institutional experience at Clinton having a very satisfactory conduct record, also working as a clerk in the hospital where he became acquainted with a Doctor Reyes who has been able to help him in understanding his past and more particularly what the future will hold for him as far as psychological and psychiatric considerations are

concerned. Buttressing this belief that subject has now gotten it all together are the statements of his sisters who appeared in his behalf and who have been in touch with him throughout his sojourn at Clinton.

Parole Hearing Summary (Appendix O) at 5; emphasis added.

In what they clearly explained was only a tentative decision, subject to review by the regional office of the Commission, the examiners voted to revoke parole because of the new crime. Relying on the crime severity chart of the youth parole guidelines (Appendix U, §2.20), the examiners classified Shepard's conduct as "greatest severity" because a weapon was discharged in the commission of a felony. Under that chart, Shepard was required to serve a minimum of 48 months in custody, with credit for 27 months in custody for the new crime.* The examiners concluded that because Shepard had only 14 or 15 months remaining to be served before his sentence expired, he could not even serve the minimum. The examiners agreed to give a decision below the guidelines and to release Shepard on parole on March 15, 1977. The decision to re-parole was based on findings that the discharge of the gun was accidental, that Shepard had no prior history of violence; that he had achieved what the examiners believed to be an outstanding record while in state confinement; that he had a solid, viable release plan, partic-

*Required under 28 C.F.R. §2.52(d)(1).

ularly as it related to his schooling; that Shepard would be under dual federal-state supervision, and that the state supervision exceeded the federal by six months. The examiners also considered the state decision to parole Shepard to have been based on his accomplishments, rather than to the detainer. Parole Hearing Summary (Appendix O) at 5-6; Transcript (Appendix N) at 39-40).

I. Argument on the Writ

At the time of argument on January 19, 1977, counsel advised the court of the events that had occurred since the filing of the petition, and presented the constitutional and statutory arguments raised in the petition. Counsel indicated that the legislative history of the statute imposed only two limitations on the issuance of a subpoena: irrelevance and duplicativeness (Transcript of January 19, 1977, at 7). Counsel argued that the four letters, one of which was a job offer, before the examiners were summaries and conclusive, without detailing specific facts, and that, with what were necessarily more precise and detailed institutional records, the decision might have been more favorable. Further, counsel also presented to the court the possibility that without either the supporting documents and without the opportunity to see and hear the witnesses, the tentative decision of the examiners might be rejected by the Regional Commissioner, who might refuse to release Shepard (Minutes of January 19, 1977, at 10).*

*Counsel also filed briefs

J. The Writ is Denied

On January 24, 1977, Judge Tenney denied the writ. With no examination of the requested New York State correctional file or psychiatric file, which no one involved in these proceedings has seen, the court found:

The information sought by way of subpoena was largely before the hearing examiners and relied on by them, and further documentation would have been "duplicative" in the words of the conference report [of Congress].

The court also found that the hearing examiners credited Haley's letter and believed that Shepard had an outstanding record while incarcerated at Clinton.

The court concluded that the denial of the subpoena was not a denial of due process where the material before the examiners had clear and convincing evidence supporting appellant's contention, even though the documents not subpoenaed might have strengthened or amplified Shepard's case. It would be error, said the court, if "a refusal to use the Commission's subpoena power ... [left] a parolee's contentions unsupported by relevant evidence at the revocation hearing."*

*The opinion of Judge Tenney is Appendix C.

K. The Regional Commissioner's decision rejects that of the hearing examiners, and Shepard is denied parole

By decision mailed to counsel on January 24, 1977,* but not received until several days later, the Regional Office revoked parole but rejected the March 15, 1977, release date. The decision put Shepard over until November 1977 for a regular review hearing:

REASONS: Your parole supervision history has been rated as negative because of your poor response to parole supervision in Florida[**] and new criminal conduct in New York. Your new criminal conduct has been classified as greatest severity because a weapon was discharged during commission of a felony and you had multiple rounds of live ammunition in your possession. You have been in state and federal custody as a result of your violation behavior for a total of 27 months. Reparole guidelines (28 C.F.R. 2.21) indicate a customary range of 48 or more months to be served before re-release. After review of all relevant factors and information presented, a decision below the guidelines appears warranted because you have been continuously confined for 27 months with good adjustment. Your re-parole at this time would promote disrespect for the paroling process.

(Appendix P; emphasis added).

*Despite the pending litigation, the Parole Commission refused to advise counsel of the Regional commissioner's decision until after a written copy was received through the mails at MCC by appellant. See memo of January 25, 1977 in parole file.

**The issue of whether appellant was denied his opportunity to present evidence on the question of his parole supervision because of the delayed hearing is concurrently before this Court in 76-7021.

L. The Second Petition and Decision

On January 27, 1977, a petition for writ of habeas corpus was filed, challenging the use of the youth parole guidelines to determine Shepard's parole release date. Shepard argued that the guidelines give no consideration of rehabilitation and, since they are presumptively controlling in the determination of a release date, are inconsistent with the Youth Corrections Act, which requires an evaluation of the need for custodial treatment both for release of a youth on supervision and for his return to custody.

During the course of oral argument on January 31, 1977, counsel also explained:

When a sentencing judge gives a sentence under the Youth Corrections Act he calls for the application of all of the provisions of the Youth Corrections Act to the individual youth. The primary factor -- two primary factors involved in the applicability of the Youth Corrections Act on the correction and paroling level are rehabilitation and individualization. It is our contention that the present Youth Guidelines take no account of either rehabilitation or individualization. In this case that conduct substantially prejudices Mr. Shepard because he has a superb rehabilitation record during his last two years in custody in the New York State institution, and based on that excellent rehabilitation record he is entitled to have the parole decision individualized to his particular circumstances.

There is no comparable requirement in a statute, at least as far as I have found so far, that would require that with respect to an adult. By imposing a Youth Correction Act the Court has sentenced, rather, deliberately chosen to sentence the individual as a

youth rather than an adult making different standards accrue to him. The guidelines, I believe, have to be readjusted or add components to it. As an initial matter I would say that the Commission should not consider the severity of the intervening crime at all. But even if that position is rejected, there is still a mid-way ground to take and that is that the Board can consider the severity of the crime but also must consider the rehabilitative efforts in its guidelines.

Transcript of January 31, 1977,
at 16-17.

Counsel then argued that the use of the New York state crime to determine the crime severity range was wrong, and that the effect of the guidelines is to create a presumption almost impossible to overcome, but that even that very limited possibility was denied to Shepard because he could not produce the documents which would enable him to meet his burden (Transcript of January 31, 1977, at 39).

Finally, counsel argued in briefs to the district court that the application of the guidelines requiring service of at least 48 months in this case show that the guidelines virtually preclude any expectation of release on parole. The range is so great that even a decision under the guidelines will not produce parole, regardless of rehabilitation.

On February 25, 1977, after the filing of briefs, the writ was denied.* Judge Owen rejected Shepard's argument, stating that "the essence of petitioner's argument is that the use of any guidelines which focus in some measure upon the severity

*Judge Owen's opinion is Appendix D.

of the offense are incompatible with the concept of focusing upon the offender himself," and did not consider whether the guidelines should be reconsidered. In a four-page opinion, the court, citing and discussing no judicial authority, concluded that Congress authorized use of the guidelines in 18 U.S.C. §4206 of the Parole Commission and Reorganization Act, effective May 15, 1976, before Shepard's parole hearing; that here the guidelines were used and departed from; that the examiners and the Commissioner gave "favorable consideration" to the "good institutional adjustment;" and that the exact weight to be given to adjustment or the guidelines is not for the court to determine.

M. Further disclosures are made as to the contents of the parole file.

After the hearing and the denial of the writs in this case, counsel received a letter from the Parole Commission that revealed, for the first time, that there were documents in the file undisclosed to Shepard at the time of his parole revocation hearing. The letter revealed that on December 20, 1976, the Commission had been sent a copy of the presentence investigation report prepared by the New York County Probation Department (see Section G, supra, and fn. at 12), and that on December 17, 1976, Mr. O'Connor sent to MCC for incorporation into Shepard's file what may constitute significant undisclosed material:

Your Institution has been designated by the Bureau of Prisons the site of Subject's forthcoming review hearing. Would you please keep the reviewed material, along with our Warrant Application, as a SEPARATE PACKET to be made available to the Commission Member or Examiner conducting the hearing. After the hearing has been conducted, please incorporate the packet into your institution file.

Additional material will be forwarded for inclusion in the above-mentioned packet as soon as received by the Commission.

(Appendix X).

N. Administrative Review

On March 17, 1977, the Regional Appeal affirmed the decision of the Regional Office, based on the reasons given in the opinion of the Regional Office (Appendix P) and because no other information was deemed sufficient to affect the decision.

ARGUMENT

Point I

THE PAROLE COMMISSION'S GUIDELINES ARE INCONSISTENT WITH THE YOUTH CORRECTIONS ACT, AND THE DENIAL OF PAROLE TO APPELLANT BASED ON THOSE GUIDELINES IS ILLEGAL AND UNCONSTITUTIONAL.

In the petition for writ of habeas corpus considered after the completion of the parole decision-making process, appellant asserted that the application of the Parole Commission's youth guidelines conflicted with the Youth Corrections Act, under which appellant was sentenced. Judge Owen rejected appellant's position, concluding that the use of the guidelines was proper and authorized under 18 U.S.C. §4206, that the Commission gave favorable consideration to appellant's "good institutional behavior," and that the weight to be placed on the guidelines or the institutional record by the Commission is not subject to review by the federal district court.

Analysis of the guidelines as they were applied to Shepard by the Commission, of the Youth Corrections Act (18 U.S.C. §5005 et seq.), of the relevant provisions of the Parole Commission and Reorganization Act (Pub. Law 94-233; 18 U.S.C. §§4206, 4214)), and of ex post facto principles clearly establish that the district judge was erroneous in his decision.

A. The standard for correctional release and return to custody
of a person sentenced under the Youth Corrections Act is
rehabilitation.*

Shepard was sentenced in 1972 pursuant to the provisions of the Youth Offender Act, 18 U.S.C. §5010(b). The purpose and goals of the statutory scheme were set forth when, in 1950, the legislation was enacted. Congress made clear that the statute was to use individualized treatment to accomplish rehabilitation:

The underlying theory of the bill is to substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the mere punitive idea of dealing with criminals and looks primarily to the objective idea of rehabilitation.

H.R. Rep. No. 2979, 81st Cong.,
2d Sess. (1950), reprinted at
1950 U.S. Code Cong. & Admin.
News at 3985.

The Supreme Court has clearly recognized this intent:

*This portion of the discussion will deal with the statutory provisions as they existed prior to May 15, 1976, the effective date of the Parole Commission and Reorganization Act, Pub. Law. 94-233, which amended the Youth Corrections Act. The prior statute is annexed as Appendix Q. The provisions of the Youth Corrections Act as amended by the Parole Commission Act are annexed as Appendix R. The amendments do not change the substance of the Youth Corrections Act provisions discussed in this section of the brief dealing with the functioning of the parole authorities, with the exception of 18 U.S.C. §5017(a). In its present form, §5017(a) refers to §4206. Section 4206 authorizes the use of guidelines (see Section C, *infra*, at 51). The changes also eliminate the Youth Division of the old Parole Board, and its functions are now included with those of the Parole Commission.

The Act was thus designed to provide a better method for treating young offenders convicted in federal courts in that vulnerable age bracket, to rehabilitate them and restore normal behavior patterns.

Dorszynski v. United States,
418 U.S. 424, 433 (1974).

This Court has similarly described the purpose of the Youth Corrections Act sentence:

In sentencing under the Youth Corrections Act, however, a court necessarily must face up to the proposition above set forth that Congress has indicated a clear preference for the objective of rehabilitation [over deterrence, retribution, and protection of the public], both in the legislative history of the Act and in the statutory language that is utilized.

United States v. Kaylor, 491
F.2d 1133, 1140 (2d Cir. en
banc), reversed on other
grounds sub nom. United States
v. Hopkins, 418 U.S. 909
(1974).

As this Court noted, the type of crime or the violence involved therein was not to be determinative of whether a youth would benefit under the statute (United States v. Kaylor, supra, 491 F.2d at 1137), and the district judge must be informed of and consider "the pertinent facts relating to the individual defendant." Id., 491 F.2d at 1139.

In the years since the passage of the statute, the courts of appeal have been unanimous in articulating the same understanding of the Congressional purpose:

The Youth Corrections Act represents a determination by Congress that young persons who are convicted of crime have, as a general rule, a higher potential for being rehabil-

itated to become useful citizens than do older, more mature offenders.

United States v. Waters, 437 F.2d 722, 724 (D.C. Cir. 1970).

Waters, emphasizing the overriding significance of rehabilitation to the scheme, specifically states that general deterrence cannot be considered in imposing sentence:

The statutory scheme does not envisage this particular combination of rehabilitation and deterrence [a 4-12 year term with confinement in a youth institution]. It appears that once it is determined that the convicted person is a youth offender (ages 18 to 22), then Congress has decreed priority for the goal of rehabilitation.

Id., 437 F.2d at 726.

Similarly, the use of a youth corrections sentence for retributive purposes is illegal and improper. United States v. Hayes, 474 F.2d 965 (9th Cir. 1973).

The position of the courts has been that

[the] basic theory of that Act is rehabilitative and in a sense this rehabilitation may be regarded as comprising the quid pro quo for a longer confinement [than would be permitted under regular sentencing provisions] but under different conditions and terms.

Carter v. United States, 306 F.2d 283, 285 (D.C. Cir. 1962); (Burger, J.);

Brooks v. United States, 497 F.2d 1059, 1062 (6th Cir. 1974); United States v. Coefield, 476 F.2d 1152, 1156-1158 (D.C. Cir. en banc 1973); Cox v. United States, 473 F.2d 334 (4th Cir. en banc), cert. denied, 414 U.S. 869 (1973); Brisco v. United States, 246 F.Supp. 818 (D. Del. 1965), affirmed, 368 F.2d

214 (3d Cir. 1966);* Rogers v. United States, 326 F.2d 56 (10th Cir. 1963); Standley v. United States, 318 F.2d 700 (9th Cir. 1963); Cunningham v. United States, 256 F.2d 467, 472 (5th Cir. 1959).

The structure of the statute made the Parole Board an integral part of the correctional purpose. The Youth Division of the Parole Board was established to carry out the purposes of the Act (18 U.S.C. §5005 (1970)), especially in providing treatment -- i.e., the corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders (18 U.S.C. §5006(g) (1970)). The Division was to hold meetings to consider problems of treatment and correction; it was to make policy recommendations about treatment for those youth offenders committed for treatment (i.e., "committed youth offenders" (18 U.S.C. §5006(f)), and it was to make orders in specific cases directing the conditional release of those youths committed for treatment or for their unconditional discharge.

The Parole Board's role in each individual's case was substantial. The statute provided that every youth committed for treatment should be studied and classified. The study included mental and physical examination, personal traits and characteristics, pertinent circumstances of his school, family life, prior criminal record, mental and physical defects, and other factors.

*Reaffirmed in Williams v. United States, 476 F.2d 970 (3d Cir. 1973).

The report made from this study, as well as the recommendations for treatment, was given to the Division and to the Bureau of Prisons. A member of the Division was required to interview the youth, review all reports, and make recommendations to the Division and the Bureau (18 U.S.C. §5014 (1970)).

Youths who need treatment could be retained in custody for treatment (18 U.S.C. §5015 (1970)). For those youths who were retained in custody, the Division received period reports (18 U.S.C. §5016 (1970)).

The critical function of the Division was based on the fact that a committed youth could be released at any time during his term of custody (18 U.S.C. §5017(a) (1970)),* and be supervised by a probation officer (18 U.S.C. §5008 (1970)) or other designated person (18 U.S.C. §5019 (1970)). The criteria to be used by the Division in determining whether continued custody was necessary are set forth in §§5015, 5006(g), 5017(a), and 5020. Since under these provisions a committed youth offender was placed in custody solely for the purpose of being given guidance to correct antisocial tendencies, when the effectiveness of this guidance was demonstrated by the institutional record which was examined on a continuing basis by the Bureau of Prisons and the Division, release from custody was the appropriate step. The correction of antisocial tendencies simply meant that the institutional record showed that the youth could be considered a person who

*The change in the language of §5017(a), effective as of May 15, 1976, is that the Commission may release a committed youth offender at any time, in accord with §4206.

would not violate the laws. This is emphasized by §5020 which permitted and continues to permit a return to custody only if the youth will be further benefited from treatment in an institution.

Indeed the constitutionality of §5010(c) permitting the imposition of a term of custody that might extend to six years which, as in Shepard's case, is longer than that which an adult could possibly receive, is premised upon the §5017(a) provision that the youth may be released from custody at "any time."

Abernathy v. United States, 418 F.2d 288 (5th Cir. 1969); United States v. Dancis, 406 F.2d 729 (2d Cir. 1969), cert. denied, 394 U.S. 1019 (1969); Cunningham v. United States, supra, 256 F.2d 467; Brisco v. United States, supra; Rogers v. United States, supra; see also cases cited at Federal Youth Corrections Act, Past Concern in Need of Legislative Re-Appraisal, 11 Amer. Crim. L. Rev. 229, 242 n.55 (1972).

In testimony before Congress during hearings on the proposed bill, the Director of the Bureau of Prisons exactly described this process:

Once the individual has received the maximum benefit from the institutional program, however, it is just as important this his release to the community be effected promptly. In the case of each person confined, there comes a period when he has his best prospects of making good in the community. His release should occur at that time. If he is released earlier, he will not be ready for the task of establishing himself; if later, he may have

become bitter, unsure of himself.

Hearings on a Correctional
System for Youth Offenders
Before a Subcommittee of the
Senate Committee on the
Judiciary, 81st Cong., 1st
Sess. 26 (1949).

The courts have so interpreted the statute:

[The] correctional authorities are given the power conditionally or unconditionally to release the offender at any time within the maximum term of confinement when, in their judgment, based on the offender's actual progress and performance, rehabilitation has been accomplished.

United States v. Waters, supra,
437 F.2d at 726 n.16.

The youth's compliance with the institution program and his cooperation are to lead to "speedy" conditional discharge with supervision. Brisco v. United States, supra, 246 F.Supp. at 820 n.1; see also Rogers v. United States, supra, 326 F.2d 56. In United States v. Cruz, 544 F.2d 1162 (2d Cir. 1976), this Court took a similar view:

The emphasis in structuring the Act was on the treatment of youth offenders under the watchful eye of an informed professional body which would tailor the length of the sentence to be served to fit the needs of the individual.

Id., 544 F.2d at 1164.

See also United States v. Jackson, Doc. No. 76-1496, slip op. 2109 (March 2, 1977); United States v. Torun, 537 F.2d 661, 664 (2d Cir. 1976).

The district courts, called upon to determine whether to

impose the Youth Corrections Act sentence, have similarly determined that release should be dependent upon the response to treatment and rehabilitation;

Treatment is to be individualized and progress is to be diagnosed in a highly personal manner by the staffs at youth facilities. 18 U.S.C. §5014. Release, therefore, has to do with adjustment in programs and response to treatment, not with the nature of the crime committed.... [There are] implied and express promises made to all prisoners upon their admission to penal institutions that their prospects for release and parole are not arbitrarily determined but rest upon their efforts to abide by the institutional rules and conform their behavior to acceptable institutional and social standards.

United States v. Norcome, .375
F.Supp. 270, 274 n.3 (D.D.C.),
affirmed without opinion, 497
F.2d 686 (D.C. Cir. 1974).

In United States ex rel. Mayet v. Sigler, 403 F.Supp. 1243, 1244 (M.D. Pa. 1975), the court concluded:

The Board of Parole has a duty to consider prisoners sentenced under its provisions for parole at any time. The history of the Act shows that the prisoner's response to so-called treatment and his supposed rehabilitation are the primary considerations to be used in determining when a Youth Offender should be released on parole. 1950 U.S. Code Congressional Service, page 3985.

In DiRusso v. United States, 417 F.Supp. 763, 766 (D.Mass. 1976), the district judge stated that he believed a youth offender sentence would provide a prisoner with a treatment program calling for continuous review and evaluation, and that he assumed a prisoner would be released immediately upon satisfactory completion of the program. See also Fletcher v. Levi, 425

F.Supp. 918 (D.D.C. 1976); DiRusso v. United States, 409 F.Supp. 1055 (D.Mass), reversed on other grounds, 535 F.2d 673 (1st Cir. 1976); Dunken v. United States, Civ. Action No. 74-72501 (E.D. Mich., May 16, 1975) (copy attached as Appendix S); United States v. Duggan, Crim. No. 74-80289 (E.D. Mich., May 16, 1975) (copy attached as Appendix T).*

Not only is this reflected in judicial precedents, but sentencing seminars for judges have emphasized the importance of the release at any time provision. The remarks to the judges at the Ninth Circuit Conference Sentencing Institute indicate that §5017(a) means that release must be available at all times, and that because of the release provision, a youth offender sentence is a reduction in an adult sentence for Rule 35 purposes. As the Director of the Bureau of Prisons advised the judges:

The possibility of conditional release at any time after commitment, plus the possibility of unconditional release within one year thereafter [Sec. 5017(a) and (b)] ... these, and other provisions of the Y.C.A. lend strong support to the view that commitment under 5010(b), with its maximum six year combined custody and supervision, constitutes a reduction of sentence when invoked in a 4208(b) case, even though the

*In its memorandum in the district court, the Government referred to several cases which were asserted to be contrary to the statutory construction given by the authorities cited here. Those cases will be discussed infra at 49 - 50. It is merely noted here that each of those cases is not contrary; is distinguishable; is premised on incorrect appraisal of the relevant principles of law; or does not consider relevant principles of law.

statute under which conviction was had
authorizes a maximum term of less than
six years.

27 F.R.D. 287, 356 (1960);
(omission in the original).

Indeed, the conference concluded:

And it seems clear, also, that resort to
the Y.C.A. is a potential, if not actual,
reduction of sentence because of the in-
determinate factor of custody which the
offender can shorten [sic] a good behavior
and response to corrective treatment.

27 F.R.D. at 357 (1960).

Of course, as noted, under §5020, a youth, such as Shep-
ard, who has been released, cannot be returned to custody un-
less he will be benefitted from custodial treatment. Thus,
the statute prescribes the test for the revocation decision
to be made in accord with Morrissey v. Brewer, 408 U.S. 471
(1972).

B. The guidelines conflict with the Youth Corrections Act

On January 24, 1977, the Parole Commission denied Shepard parole. An examination of the Regional Commissioner's opinion (Appendix P) denying Shepard release and putting him over for a hearing in November 1977 shows that the offense severity rating determined the decision. The Commission found that, under the re-parole guidelines of §2.21(b), which are based on the crime severity table of §2.20,* Shepard's new criminal conduct was rated as "greatest severity." This rating determined that Shepard had to serve at least 48 months in custody. Since under 28 C.F.R. §2.52(d)(1), Shepard was to receive credit for his time in state custody, 27 months was deducted, requiring service of at least 21 months, although Shepard's full six-year sentence would be completed in 15 months. The Commission noted that Shepard had "good adjustment in custody" and that a decision below the guidelines appeared warranted, but concluded that re-parole would promote disrespect for the parole process. It refused to release Shepard, and gave him only a hearing date in November 1977, some 10 months later. Thus, Shepard is still in custody without a parole release date.

An analysis of the re-parole guideline based on the crime severity ratings shows that it is contrary to the Youth Corrections Act as it read prior to the 1976 amendments, and as §5020, which was substantively unchanged by the amendments continues -- to read.

*The relevant parole regulations appear as Appendix U.

In November 1973, more than a year after Shepard had been sentenced as a youth offender, the Parole Board promulgated what are today called the adult and youth offender guidelines. 38 Fed.Reg. 31942 (November 19, 1973). The procedures and application of the guidelines, applied by the Board and now the Commission, are identical for both adults and youth offenders. United States v. Cruz, 544 F.2d 1162, 1163 (2d Cir. 1976); DiRusso v. United States, supra, 417 F.Supp. at 645; 41 Fed.Reg. 37316-31317 (September 3, 1976). They set a range of months which a prisoner must serve before he is to be released on parole.* The range of months applicable to a particular parolee is determined by grading the severity of his crime (the crime severity chart grades crimes from "low" to "greatest severity") and determining the person's "salient factor" score. The point at which the crime severity and the salient factor crosses determines the range of months within which parole release is deemed appropriate. For description, see United States v. Slutsky, 514 F.2d 1222, 1227 (2d Cir. 1975); Battle v. Norton, 365 F.Supp. 925, 929 (D.Conn. 1973).

The theoretical basis for the guidelines is that each table measures a feature considered by the Commission in mak-

*The only distinction between adults and youths in the guideline analysis is made in the range of months within each category. The ranges were increased in September 1976. 41 Fed.Reg. at 37322-37324, thereby amending those published at 41 Fed.Reg. 19326 (28 C.F.R. §2.20 (1976)).

ing a decision. The nine salient factors* are qualities about the individual candidate for release that are, with one exception, not changeable or changed during the period of incarceration. The Parole Board, based solely on an appraisal of its own decision-making process prior to the formulation of the guidelines (Battle v. Norton, supra, 365 F.Supp. at 929 n.3), determined that these characteristics would predict parole success, thereby evaluating whether there is a reasonable probability that the inmate will live in society without violating its laws. Battle v. Norton, supra, 365 F.Supp. at 929, and affidavit of Maurice Sigler, Chairman of the Parole Board, at 932 (hereinafter, "Sigler affidavit").

The offense severity table is intended to measure the period of time an inmate must serve, after which his release "would not deprecate the seriousness of his offense or promote disrespect for the law," and thus be inconsistent with the welfare of society. See 41 Fed.Reg. (No. 93) 19326, col. 1-2 (May 13, 1976).** This criterion is justified as a measure of the general deterrence effect of punishment, which affects the

*The nine factors are: prior convictions, prior incarcerations, age at first commitment, whether the offense involved auto theft, parole revoked, drug dependence, GED diploma, employment or schooling during last period in community, and release plan to live with spouse.

The general education diploma is the one factor that can be altered while in custody. See Appendix U.

**Origin of the crime severity classifications is unknown. Billiteri v. United States Board of Parole, 400 F.Supp. 402, 408 (W.D.N.Y. 1975).

welfare of society, and is unrelated to the inmate's own characteristics or institutional record. United States v. Mander-
ville, 396 F.Supp. 1244, 1247 n.7 (D.Conn. 1975); Wiley v.
United States Board of Parole, 380 F.Supp. 1194, 1197 (M.D.Pa.
1974); Battle v. Norton, supra, 365 F.Supp. at 931, and Sig-
ler affidavit at 932.

Thus, it is apparent that the guidelines themselves take no account of institutional record or program achievement. However, even the individualized consideration of pre-incarceration factors is eliminated when the parolee, like Shepard, is being reconsidered for parole after a violation that is a new crime. The Commission, under §2.21(b)(1) of its Rules* promulgated on May 15, 1976, some four years after Shepard was sentenced, rates the new crime which is the parole violation on the crime severity chart in §2.20. The new crime is the sole factor considered in determining the range of months a parole violator is expected to serve. Thus, the crime severity rating, which, by the Commission's own acknowledgment, is a measure for general deterrence, is the basis for determining when a parolee is to be eligible for release and when he is to be returned to custody.**

*See Appendix U.

**This is not to say that the actual conduct of the youth in committing a new crime is not relevant to determining whether the youth should be released. That conduct, when viewed with later institutional performance, may help to decide if antisocial conduct is cured, i.e., specific deterrence. But rating the new crime on a crime severity table for general deterrence purposes is impermissible.

Since the decision what to do with a parolee who has violated his conditional release (Morrissey v. Brewer, 408 U.S. 471, 480 (1972)) is controlled by the §5020 standard -- whether further in-custody treatment will benefit the youth (see Point A, supra), the re-parole guidelines are inappropriate and illegal. Judge Owen's statement, that in the revocation hearing the focus is on the crime and not on the youth, is totally inconsistent with §5020, which remained unchanged by the 1976 amendments. See also Morrissey v. Brewer, supra, and Moody v. Daggett, 97 S.Ct. 297 (1976). Indeed, the amended §5005 specifically states that Chap. 311 of the Parole Commission and Reorganization Act, which includes §4206, shall not apply where laws provide for other standards.

Moreover, courts have found the effect of the crime severity rating to be illegal when applied to release under §5017(a). In Fletcher v. Levi, supra, 425 F.Supp. at 921, where the youth offender had a very high salient factor score, and therefore an excellent prognosis for parole success, the Parole Board asserted that parole could be denied solely upon the crime severity, which was "greatest." The court stated:

1. The Youth Corrections Act is a separate comprehensive sentencing scheme which is an alternate to the adult sentencing scheme for eligible persons. The Youth Corrections Act includes not only a separate commitment procedure but also separate custodial and probation provisions and separate release provisions.

2. The primary purpose of the Youth Corrections Act is to rehabilitate the youth offender. Thus, the youth offender is committed for treatment in lieu of imprisonment otherwise authorized by law. Once committed, application of the Youth Act's provisions for treatment and release are to fit the individual and are not to be determined by the offense committed.

3. It is unlawful to deny conditional release to a youth offender who is otherwise eligible for such release based solely on the conclusion by the Parole Board that the offense is so severe that release would depreciate the seriousness of the offense and thus be incompatible with the welfare of society.

In United States v. Norcome, supra, 375 F.Supp. at 274, the court clearly expressed the inconsistency of general deterrence with the whole plan and design of the Youth Corrections Act:

To the extent that this table interfaces the decision-making of corrections authorities to whom Congress assigned the responsibility of providing individualized treatment for youth offenders, it makes a mockery of the federal Youth Corrections Act. Congress did not mandate that the commitment of youths who participated in so-called serious crimes be for a longer period than others.

The court went on to decry the wasted expenditures for authorized studies and examinations* which are ignored and worthless when parole release is determined by the crime severity table.

In United States ex rel. Mayet v. Sigler, supra, although the parolee had a very high salient factor score, the very high severity rating required a 20-27 month period of incarceration for the youth. The court found that

... such guidelines, which utilize an analysis of the prisoner's offense as the critical factor in determining how long he will be incarcerated, violate the purposes of the Youth Corrections Act.

Id., 403 F.Supp. at 1244.

*18 U.S.C. §§5010(e), 5014, 5016.

In Snyder v. United States Board of Parole, 383 F.Supp. 1153, 1156 (D.Colo. 1974), the court found it invalid for the Board to deny a youth parole because a decision outside the guidelines was unwarranted. The court assumed that the decision was based on crime severity, and found that standard to be inconsistent with the Youth Corrections Act. See also United States v. Duggan (Appendix T); cf. United States v. Dunkin, supra (Appendix S); DiRusso v. United States, supra, 417 F.Supp. 763.

Application of the guidelines to those inmates who have been given sentences under former 18 U.S.C. §4208(A)(2)* has been condemned on the same principle. The "A-2" sentence was intended to give a district judge a mechanism to permit adjustment of the length of a defendant's sentence to his progress in rehabilitation and his attitudes on return to society. Garafola v. Benson, 505 F.2d 1212, 1217-1218 (7th Cir. 1974). Where the legitimate expectation of the district judge was that an inmate would be considered for parole only on institutional performance, and the guidelines frustrated this purpose by applying a different standard, the sentence would be revised. United States v. Salerno (Silverman), 538 F.2d 1005, 1008 (3d Cir. 1976); United States v. Slutsky, supra, 514 F.2d 1222; United States v. Kortness, 514 F.2d 167, 180 (8th Cir. 1975).**

*Now 18 U.S.C. §4205(b)(2).

**In another series of cases, the courts have attempted to resolve the conflict between "A-2" sentences and application of the guidelines by requiring modification of the Board's

Following these appellate precedents, in United States v. Randle, 408 F.Supp. 5 (N.D. Ill. 1975), the judge reduced a term of custody, saying:

In effect, the Parole Board has substituted its guidelines for the judgment of the sentencing judge as to the appropriate sentence for a particular defendant.

Id., 408 F.Supp. at 7.

To justify use of the guidelines, the Commission has taken the position that rehabilitation is not ignored, that it is considered a factor for parole release. However, this argument must be facetious, for the procedure of both the Board and the Commission is not even to apply the guidelines until the inmate has achieved a good prison record. Thus, the notes immediately following the guideline tables state:

(Footnote continued from the preceding page)

procedures. An inmate sentenced under "A-2" was usually given a release hearing within four months of entry into the institution, before he had time to establish a relevant prison record. The Board would deny parole at that hearing, acknowledged by the Board to be a sham (Garafola v. Benson, supra, 505 F.2d at 1215 n.2), and set the prisoner over for a term beyond the 1/3 point of his sentence. The 1/3 point was the scheduled time for consideration of all inmates, and thus, the prisoners given A-2 sentences received less favorable consideration than those sentenced regularly. The courts attempted to resolve the problem by requiring a second hearing at the 1/3 point for those given A-2 sentences as well. Grasso v. Norton, 520 F.2d 27 (2d Cir. 1975); Garafola v. Benson, supra, 505 F.2d 1212; Stroud v. Weger, 380 F.Supp. 897 (M.D.Pa. 1974). The assumption in each of these cases was that prison program response and rehabilitation would be appropriately considered at the hearing held at the 1/3 point. However, this assumption is not valid. See Grasso v. Norton, supra, 520 F.2d at 39 (Feinberg, J., concurring and dissenting), and infra at 46-48.

1. These guidelines are predicated upon good institutional conduct and program performance.

(See Appendix U).

28 C.F.R. §2.20(b) (see Appendix U) states that

... the time ranges specified by the guidelines are established specifically for cases with good institutional adjustment and program progress.

See also Sigler affidavit in Battle v. Norton, supra, 365 F. Supp. at 932.

Another position taken by the Board has been that, once the guidelines are applied, a decision below the guidelines is possible, premised on "exceptionally good institutional behavior." Sigler affidavit in Battle v. Norton, supra, 365 F. Supp. at 932. This assertion and references to 28 C.F.R. §2.20 (c), which states that decisions may be made outside the guidelines, led some courts in early decisions to conclude that individualized consideration and consideration of institutional records showing rehabilitation was a significant factor in parole eligibility and release decisions, and that the Board was flexible in its decision-making process. See Wiley v. United States Board of Parole, supra, 380 F.Supp. at 1197;* Lupo v. Norton, 371 F.Supp. 156, 163-164 (D.Conn. 1974); Grasso v. Norton, 376 F.Supp. 116, 119 (D.Conn. 1974), affirmed in

*It is significant to note that Wiley considered only the adult guidelines as they related to sentences which did not require emphasis on rehabilitation. Further, in that case the guidelines were sustained because the court accepted the Board's representations that the application of the guidelines was flexible and that rehabilitation was considered.

part, Grasso v. Norton, 520 F.2d 27 (2d Cir. 1975); LoCicero v. Day, Civ. Act. No. 1144 (E.D.Ky., February 15, 1974) (Appendix V); Battle v. Norton, supra, 365 F.Supp. 929.*

However, this flexibility or consideration did not, in fact, occur here where, as noted, the Regional Commissioner denied parole, and Shepard remains incarcerated based on the impact** of the crime severity table.

The pretext of flexibility and consideration of rehabilitation has been generally rejected after 1974. An exhaustive study of the guidelines has produced the conclusion that the Parole Commission has "abandon[ed] any attempt to condition release on rehabilitative factors." Parole Decision-Making and the Sentencing Process, 84 Yale L.J. 812, 826 (1975), cited in Grasso v. Norton, supra, 520 F.2d at 39 (Feinberg, J., concurring and dissenting).***

*While Battle upheld the use of guidelines, including crime severity, it did not sustain the use of crime severity to the exclusion of all other factors, and thus is not of any value in this case. See United States v. Manderville, 396 F.Supp. 1244 (D.Conn. 1975).

**Judge Owen noted that the regional office opinion stated that Shepard's record was considered and the guidelines reduced. That, however, is not what in fact happened. The guidelines resulted in a denial of parole and the refusal to set a release date.

***Even the district court opinions in Grasso v. Norton, supra, while willing to assume, based on the Board's representations, that rehabilitation and prison record will be considered, recognized that the guidelines controlled in 92-94% of the cases. Id., 376 F.Supp. at 118; see also 371 F.Supp. at 174.

This Court has expressed such a conclusion in several cases:

From all indications, the guidelines are relied upon heavily in making parole determinations. For example, the Board's regulations, while reciting that the prescribed time ranges are "merely guidelines," nevertheless seem to reserve parole below the guidelines to exceptional cases.

United States v. Slutsky,
supra, 514 F.2d at 1228.

In United States v. Torun, supra, 537 F.2d at 664, this Court found that the guidelines rely on criteria other than individual rehabilitation, and that the sentence does not depend on the youth offender's conduct while in detention. See also United States v. Cruz, supra, 544 F.2d at 1164 n.6.

In DiRusso v. United States, supra, 417 F.Supp. at 766, the court noted that a parole official had stated that release was not automatic on completion of a program, but is determined by application of the guidelines as if an adult sentence had been imposed. In Garcia v. United States Parole Board, 409 F.Supp. 1230, 1238-1239 (N.D. Ill. 1976), the court found that individual parole consideration with the sentence time given by the judge is replaced by guidelines with "relatively rigid application." The court found that the "historical assumption that the Board will give meaningful parole consideration to a defendant with a good institutional record is no longer a reality unless the sentence is a long one."

That same court, in United States v. Wigoda, 417 F.Supp.

276 (N.D. Ill. 1976), found that blind adherence to parole guidelines made meaningful consideration impossible (417 F. Supp. at 281) where the Board refused to give a decision outside the guidelines in the face of very strong materials before the hearing officers favoring parole and prison officials' recommendation of release.

The courts have noted that a decision outside the guidelines is exercised infrequently (United States v. Manderville, supra, 396 F.Supp. at 1246);* that the guidelines are followed in an overwhelming number of cases (United States v. Randle, supra, 408 F.Supp. at 7).

As a matter of logic, the Board's position itself establishes that release is not permitted on rehabilitation and prison performance. The Board acknowledges that the crime severity scale is presumptively correct and that, to overcome the presumption, an inmate must establish an extraordinary record of rehabilitation which, in any event, may not produce release. See United States v. Wigoda, supra, 417 F.Supp. 176; Garcia v. United States Board of Parole, supra, 409 F.Supp. 1230. Although the statute requires that the Board treat a parolee eligible for release at any time, the guidelines impose a

*Interestingly, in Manderville, 396 F.Supp. at 1248 n.10, Judge Blumenthal rejected the conclusion made one year earlier by Judge Newman in Lupo v. Norton, supra, that the Board considered the length of sentence imposed by the court. The length of sentence as reflective of the court's appraisal of the seriousness of the crime was considered by both judges as a factor to be considered in crime severity.

presumptively correct eligibility date at a specific point. The whole decision-making process revolves around that time period.

There are several 1976 district court cases which sustained the validity of the guidelines as applied to youth offenders. These decisions, however, are incorrect in logical analysis, or are distinguishable on their facts. Barr v. United States, 415 F.Supp. 990 (W.D.Okla. 1976); McKay v. United States, No. 76-1242-Civ. CA (S.D.Fla., September 22, 1976) (Appendix Y). In both cases, the courts concluded that individual characteristics are computed on the salient factor scale. Of course, as noted, the salient factor chart is not used in Shepard's situation, and further, those guidelines have nothing to do with prison performance. In addition, Barr equates consideration of the offense charged with the controlling effect of the offense severity table. Even if the Board could properly consider the offense in determining rehabilitation (see fn., supra, at 40), the Board does not even claim to be doing that. Rather, it uses the severity chart to carry out general deterrence. McKay accepts the now repudiated assumption that the guidelines are flexible. Interestingly, McKay proposes the argument, made by the Government below, that the general parole release standards in §4206 control because standards for parole release or reincarceration do not appear in the Youth Corrections Act. The reasoning of McKay has not been accepted by any other court, and is simply not correct.

See supra at 31-32.

Walton v. Levi, No. C-76-1806 (N.D.Cal., December 8, 1976) (Appendix Z), and, in part, McKay, rely upon the Parole Commission and Reorganization Act, 18 U.S.C. §4206(a) (Appendix W), and the amendments to §5017(a) of the Youth Corrections Act (Appendix R) to justify use of the guidelines. The invalidity of this rationale is discussed in Section C, infra.*

*In one other case, Kramer v. United States, 409 F.Supp. 1402 (N.D. Ga. 1976), the court sustained the use of the guidelines on the basis of the district court opinion in United States v. Silverman, 406 F.Supp. 862 (D.N.J. 1975), which was reversed on appeal in United States v. Salerno (Silverman), supra. Even that court could find only a theoretical basis for meaningful consideration of prison performance.

C. Application of the guidelines to Shepard is violative of the quid pro quo of the Youth Corrections Act, the ex post facto provision, and due process.

In his opinion denying the writ (Appendix D), Judge Owen concluded that the Parole Commission and Reorganization Act, effective May 15, 1976, authorized use of the guidelines as a factor in parole release. He concluded that the amendments to §5017(a) (Appendix R) referred to the paroling provisions of 18 U.S.C. §4206(a), and that §4206(a) (Appendix W) authorizes use of the guidelines. The justification for the imposition of the longer term of custody under §5010(c) was, in part, that under §5017(a), release was possible at any time, depending on the rehabilitative record (see Section A, supra), and that, under §5020, return to custody would not take place unless treatment was necessary. Conditioning a youth's release or his return to custody on a consideration identical to that used with adult sentences is a violation of the quid pro quo for the longer term. As such, the re-parole guidelines are illegal. United States ex rel. Sero v. Preiser, 506 F.2d 1115 (2d Cir. 1974), cert. denied, 95 S.Ct. 1587 (1975).

Moreover, under the ex post facto clause of the Constitution, Shepard's case cannot be governed by the release guidelines which came into effect in 1973, after his criminal conduct,* or by the re-parole guidelines which came into effect

*The critical event for determining whether a piece of

in 1976. The new §4206 does not change that result, for even if use of the guidelines is now authorized by Congress,* the guidelines make more harsh the sentence which existed at the time of the crime.** Lindsey v. Washington, 301 U.S. 397 (1937); Kring v. Missouri, 107 U.S. 221 (1882); Love v. Fitzharris, 460 F.2d 382 (9th Cir. 1972).

(Footnote continued from the preceding page)

legislation is violative of the ex post facto provision is the date of the crime. In the Matter of James Medley, 134 U.S. 160 (1890).

*In the court below, appellant pointed out that Congress had not legislated any particular factors that should be included in the guidelines, but merely, in §4206, authorized guidelines which made crime severity not a separately rated consideration, as it is now, but one of the many factors that can be considered in determining rehabilitation. It was also suggested that prison performance be added to the salient factor table. This restructuring of the guidelines is consistent with the legislative history of the new parole statute (S. Rep. No. 94-369, 94th Cong., 1st Sess., at 16 (September 11, 1975)), and the authorities cited in that legislative history. See The National Advisory Commission on Criminal Justice Standards and Goals, Corrections, §12.3 at 423 (1973); President's Commission on Law Enforcement and Administration of Justice, Corrections, at 64 (1967). This suggestion was rejected by the Government and the court, both of which found that the current guidelines, and in particular the use of crime severity charts, alone was proper.

It was also argued that §5005 stated that §4206 was to be used where consistent with other statutes, and that therefore Congress intended guidelines to be consistent with the Youth Corrections Act. This argument was not even discussed below.

The rejection of these arguments by the court raises the constitutional issues presented here.

**The ex post facto provision applies to regulatory agencies. Ross v. Oregon, 227 U.S. 150, 163 (1913); Love v. Fitzharris, 460 F.2d 382, 384 (9th Cir. 1972).

The immediate parole eligibility requirement is one imposed by the court at sentencing. United States v. Jackson, supra, Doc. No. 74-1496, slip op. 2109; United States v. Salerno (Silverman), supra, 538 F.2d 1005; United States v. Wiggoda, supra, 417 F.Supp. 276; United States ex rel. Mayet v. Sigler, supra, 403 F.Supp. at 1243; United States v. Randle, supra, 408 F.Supp. 5; United States v. Manderville, supra, 396 F.Supp. 1244. Since parole eligibility is part of the law annexed to a crime when committed, any legislative change in eligibility that would work to a prisoner's disadvantage may not be retroactively applied. Warden v. Marrero, 417 U.S. 653, 658 (1974); Love v. Fitzharris, supra.

The guidelines promulgated by the Board changed eligibility for release from any moment during the term of custody to a fixed point during the term, determined by the crime severity. The law requires a continuing exercise of discretion by the Commission to evaluate suitability for release, and to delay any meaningful exercise of that discretion until the guideline range is reached makes the punishment more severe. Cf. United States v. Henson, 486 F.2d 1292 (D.C. Cir. 1973). Further, the right to earn release for achieving a good record, which is the statutory standard, cannot be delayed or made less valuable. See Greenfield v. Scafati, 277 F.Supp. 644 (D.Mass. 1967), affirmed per curiam, 390 U.S. 713 (1968). What is more, when the standard for release changes from custodial conduct, over which the inmate has control, to past conduct, over which

he has none, the burden of proof changes adversely. See Marks v. United States, 45 U.S.L.W. 4233 (S.Ct., March 1, 1977).

These changes inflict a greater punishment than the law annexed to the crime when it was committed, and alter Shepard's condition to his disadvantage. Lindsey v. Washington, *supra*, 301 U.S. 397; In the Matter of James Medley, *supra*, 134 U.S. 160; Kring v. Missouri, *supra*, 107 U.S. at 228-229; Calder v. Bull, 3 U.S. (3 Dall) 305, 390, 396 (1798).

Not only the ex post facto provision, but due process standards as well, preclude a retroactive change to the disadvantage of a person in the criminal process. Marks v. United States, *supra*, 45 U.S.L.W. 4233.

D. Shepard is entitled to have his claim examined in this proceeding and to be released from custody.

In United States v. Cruz, supra, and United States v. Jackson, supra, this Court was asked to decide whether particular sentences imposed under the Youth Corrections Act were legal. The sentences were imposed for the purpose of avoiding the effect of the guidelines. This Court stated that if the guidelines were interfering with the intended application of the Youth Corrections Act, the appropriate procedure was through Congress, and not the imposition of an impermissible sentence.

Here, however, there was a legal Youth Corrections Act sentence imposed, and the guidelines are being used to circumvent the appropriate effects of the youth sentence. It is the legality of the guidelines -- not the sentence -- that is under attack. Accordingly, a challenge to the custody of Shepard, which is based on the guidelines, is appropriately brought under 28 U.S.C. §2241.

Point II

APPELLANT WAS DENIED HIS STATUTORY RIGHT TO A COMMISSION SUBPOENA FOR EVIDENCE AND WITNESSES, AND WAS THEREBY DENIED HIS RIGHT TO A DUE PROCESS HEARING.

On January 5, 1977, counsel for Shepard requested that, pursuant to Morrissey v. Brewer, 408 U.S. 471 (1972), and 18 U.S.C. §4214(a)(2), the Commission issue subpoenas for Shepard's New York state institutional record, including psychiatric reports, and for the appearance of his caseworker at the parole revocation hearing. By letter of January 10, 1977, the Regional Commissioner denied the request, and since the records and testimony were otherwise unavailable to Shepard, they were not presented to the hearing examiners who conducted the parole revocation hearing on January 11, 1977.

Thereafter, Shepard filed a petition for writ of habeas corpus, asserting that he was denied a hearing in accord with due process because he was unable to present witnesses and documentary evidence important to his case.

Shepard asserted that the only material he was able to present with respect to his prison record was a short, three-paragraph, largely conclusory letter from his caseworker, S.W. Haley (Appendix G; part of Document #10 to the Record on Appeal in 77 Civ. 83). The letter said that Shepard has and continues to maintain a record of excellent institutional adjustment; that he had a clerical position in the hospital and was a re-

sponsible and efficient worker; that he attended two college semesters at Clinton Community College and had a perfect grade average of 4.0. The report concludes that Shepard underwent significant personal growth, has directed his energies to self-improvement, and that, despite obstacles, his attitude has been positive. Two other letters related only to Shepard's academic achievements, but did not speak of his institutional record.

Judge Tenney denied the writ (Appendix C). He referred to the legislative history of §4214, granting subpoena power, which states that the Commission shall consider whether the evidence and testimony is relevant and duplicative in deciding to issue the subpoena. House Conference Report No. 94-838, 94th Cong., 2d Sess., 25 (February 23, 1976), reprinted at 1976 U.S. Code Cong. & Admin. News at 599. Without examining the requested files, and based on Haley's letter, Judge Tenney stated that the information appellant sought from the institutional files was largely before the examiners, and would be duplicative. He concluded that Shepard had clear and convincing evidence of his position, and that the right to present such evidence must not be thwarted by a refusal to issue subpoenas which would leave a parolee's contentions unsupported by relevant evidence.

A. The record contradicts the finding of duplicativeness.

The finding of duplicativeness was made without any examination of the institutional record file that Shepard wanted to have the examiners consider. There is no basis for concluding that there was no other or additional evidence in that file. The court itself acknowledged that there might have been information which would have strengthened or amplified Shepard's position (Appendix C at 7).

Since there is no factual basis in the record for the finding made, it is clearly erroneous and must be reversed. F.R. Civ.Proc. 52(a); Ritter v. Morton, 513 F.2d 942, 949 (9th Cir. 1975); United States ex rel. Paxos v. Rundle, 491 F.2d 447, 453 (3d Cir. 1974); Humphrey v. Southwestern Portland Cement Co., 488 F.2d 681, 694 (5th Cir. 1974); 9 Wright, FEDERAL PRACTICE AND PROCEDURE §2585 at 735 (1971).

Further, the record contains uncontradicted assertions by Shepard and his attorney, both before the Court and the hearing examiners that even from the limited information available, the state institutional file would provide other and additional material. The most significant new material was the psychiatric report prepared by Dr. Reyes at the state prison. Shepard stated that from his contact with Dr. Reyes and his work at the clinic he believed the report would be favorable. This report was intended to contradict reports in the parole file prepared by federal correctional officials and Shepard's federal probation officer.

These included a psychoanalytic report which stated that Shepard was a psychopathic personality who will continue to act in an antisocial manner, disregarding rules and regulations, and who would not profit from counselling or therapy. In the face of this report in the file before the examiners, the favorable report of a psychiatrist who spent substantial time with Shepard at Clinton and who guided him during his period of custody could not possibly be duplicative, but must, indeed, be contradictory.

Further, at the hearing, Shepard advised the examiners that he had known Haley as well as other corrections officials since he had been at Clinton prison. Thus, both Haley* and the entire state institutional file were uniquely able to reflect facts as to Shepard's work record, his developing relationship to peers and supervisors, his continuing ability to take directions and follow rules, and his ability to be helped by guidance and therapy. However, none of this historical material came into the record through an independent source of information, and Shepard was able to relate only that he thought the material would be helpful.

*Moreover, as Shepard's correctional counselor, Haley would, in order to perform his duties properly, be required to investigate Shepard's performance and attitudes. As a trained expert in the field of corrections, his testimony takes on greater importance to a fair determination.

By way of contrast, Haley's letter relating only Shepard's current status did not supply that factual history. Haley gave no description of what had occurred or how Shepard had managed to achieve what he had done. This absence of factual material is in obvious contrast to the enormous quantity of adverse factual material from federal officials before the examiners and the Regional Commissioner. The reports related in great detail events that had occurred some three years earlier, describing Shepard's poor parole experience culminating in the new crime after his release from federal custody. There was no comparable written material detailing the dramatic progress that occurred thereafter.

Of course, the presence of Haley himself would have enabled counsel to explore these unknown areas. Counsel asserted that Haley's testimony would not be possible to summarize in writing because of its nature and complexity. Considering the brevity of the three-paragraph letter Haley had written about Shepard in response to the Parole Commission's own request for information, it is apparent that counsel's analysis was correct. The October 14 letter shows that Haley was either unable to give more factual detail in writing or that the letter was written pursuant to the usual form employed by the institution. Thus, since Haley was unable to appear voluntarily at the parole hearing, the only way counsel could hope to elicit the relevant and detailed information was to have him appear by subpoena for questioning.

Based on this record, the finding that the institutional file was duplicative of the information already in the parole file is not only totally unsupported by the record but is, in fact, refuted by facts uncontradicted in the record.

Indeed, even the Parole Commissioner did not assert that the institutional file would be duplicative when he denied the request for subpoenas. There are actually two documents that reflect the reasons for the Commissioner's decision. In the memorandum of January 10 (Appendix L), it was revealed that the Parole Commission had procedures which make no mention of a subpoena for records. If there is such a regulation, it is contrary to §4214, which specifically includes a subpoena for "evidence." It is inconceivable that any interpretation of the word "evidence" would not include the institutional file.

As to a request for the subpoena for witnesses favorable to a parolee,* the memorandum stated that procedures permit a request when the testimony is necessary for proper disposition, or when the witness will not appear voluntarily or provide a written statement. Clearly, assuming that all three requirements are necessary, the first two are present. As to the third, while Haley did write a letter, as indicated, it did not reveal a substantial part of the relevant information.

The Regional Commissioner, in his letter of January 10, 1977 (Appendix M), gives as his reasons for denial of the

*The memorandum clearly excludes witnesses adverse to the parolee.

issuance of subpoenas:

1. that the Commission had six letters documenting Mr. Shepard's institutional performance which will be considered by the hearing examiners;
2. that such letters are traditionally considered by the Commission;
3. that institutional performance is only one of several factors considered in determining whether to revoke parole;
4. that if the state correctional official and records with relevant information were subpoenaed here, they would have to be subpoenaed in every case;
5. that the normal procedure is to review written progress reports.

The record clearly reveals the parole file did not include the six letters. The only letter documenting institutional performance was Haley's. Two others related only to the school grades, and one was a job offer. See affidavit of Gordon Johnson dated January 14, 1977, attached to Document #10 to the Record on Appeal in 77 Civ. 83; Transcript (Appendix N) at 30-31. The hearing examiners did not know of any other letters. However, by reference to the memorandum of January 10, it appears that the Commissioner was speaking of two other letters from Clinton prison. Even a scanty examination however, indicates they are worthless. One, dated August 6, 1975, stated appellant's length of custody, maximum expiration date, conditional release date and the date of the scheduled appearance before the state parole board. The other, dated June 25, 1976, was from a parole officer at Clinton asking if the federal parole commission intended to take Shepard into custody based on the pending parole detainer.

Thus, the Commission did not have six letters, but only one, which reflected institutional adjustment.

As already noted, the one letter, even if "traditionally considered," is no substitute for the actual institutional records, which establish a day-by-day, month-by-month cumulative record detailing precisely Shepard's continuing rehabilitation.

The Commissioner's declination to issue a subpoena because he would then have to do so in every case is simply no basis for refusing to issue the subpoena. The clear intent of Congress was that two considerations be made in each case determining whether to issue subpoenas: whether the evidence is relevant, and not duplicative.

The Regional Commissioner's position that he need not subpoena the records because institutional behavior is only one factor considered in the decision-making process is irrelevant and disingenuous. Even if many other factors are considered, the Government and the Supreme Court acknowledge that institutional behavior is one of the most significant factors to be considered in the parole revocation decision. The Supreme Court, in Moody v. Daggett, 97 Sup. Ct. 297 (1976), justified the delay in a parole revocation hearing for parolees serving new terms in custody on the ground that the prison record was critical to the decision whether to re-release the parolee or to compel further custody:

Finally, there is a practical aspect to

consider, for in cases such as this, in which the parolee admits or has been convicted of an offense plainly constituting a parole violation, the only remaining inquiry is whether continued release is justified notwithstanding the violation. This is uniquely a "prediction as to the ability of the individual to live in society without committing anti-social acts." Morrissey [v. Brewer, 408 U.S. 471 (1972)] at 480. In making this prophecy, a parolee's institutional record can be perhaps one of the most significant factors.... [F]orcing decision immediately after imprisonment would ... deprive the parole authority of this vital information....

Id., 45 U.S.L.W. at 4020.

In Moody, the Parole Commission, through its attorney, the Solicitor General of the United States, argued forcefully in its brief that a delay in the parole revocation hearing until after completion of an intervening sentence is required to permit the Commission to make an informed decision based on the parolee's institutional record built during that intervening sentence:

After the intervening sentence has been completed, however, the Commission will have before it the record of the parolee's behavior during the intervening sentence; the Commission then will be able to make a more informed prediction whether the parolee's release would be compatible with the welfare of society.

Government Brief in Moody v. Daggett, Supreme Court Doc. No. 74-6632, at 45-46.*

*A copy of this brief is available for the Court.

This strategy [of holding hearings before the end of the intervening sentence] would sacrifice the Commission's ability to make informed decisions by committing it to a course of action before it could learn how the parolee has behaved during the intervening sentence. This would deny to the Commission the facts that may be most important to its decision.

Id. at 52.

See also Government Brief in Moody at 33.

Thus, there is no basis for finding either that the Commission's exercise of discretion was denied on the ground that the records were duplicative or that the records were, in fact, duplicative.

B. Due process requires that a subpoena be issued for the file and for Haley

The district court also ruled that the due process requirements of Morrissey were not violated by Shepard's inability to present the critical evidence. The court stated both that Shepard had clear and convincing evidence to establish his position, and implied that due process would be violated if a parolee was denied a subpoena with the result that his position was unsupported by relevant evidence. However, the court's standard was made without consideration of the burden of proof that has been placed upon the parolee in a parole revocation hearing, and in light of these burdens, the standard falls short of providing the parolee with an opportunity for a fair hearing.

The revocation of parole is only a possibility, and is not

required after a violation, even if the violation is a new crime. Morrissey v. Brewer, supra, 408 U.S. at 484, 488; Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973); 18 U.S.C. §4214(d); 28 C.F.R. §2.52. However, the Commission's articulated position is that it usually revokes parole if the violation is a new crime unless there is substantial mitigating evidence (28 C.F.R. §2.47(c)). Thus, the opportunity to present evidence to meet this extraordinary burden of proof is critical to counteract the Commission's predisposition to an unfavorable decision.

Further, if it is accepted by this Court that the guideline range as determined solely by the crime severity table was appropriately applied in this case, then the burden upon Shepard was to establish by a showing of an extraordinary institutional conduct (Battle v. Norton, supra, 365 F.Supp. at 932, Sigler affidavit; 28 C.F.R. §2.21(c)) that he might overcome the presumptive correctness of the guidelines so that he might be released immediately or in a short time. To meet this most extreme burden of proof, it seems to follow, a fortiori, that the most critical and relevant evidence is the institutional file and the testimony of the caseworker. The Supreme Court has so stated in Moody v. Daggett, supra.

Of course, if, as appellant asserts (see supra at 27), the critical factor is to establish that there is sufficient rehabilitation so that further custody is unnecessary, the institutional record is also critical to this burden of proof.

Under either theory, since a burden of proof at a level

high enough to overcome two adverse presumptions has been placed upon the parolee-youth in order for him to have his liberty, it follows that he must be given the qualitatively sufficient opportunity to meet that burden. Cf. Speiser v. Randall, 357 U.S. 513, 525-526, 529 (1958). The test that due process is not violated unless he is totally denied his evidence is insufficient.

Judge Tenney concluded his opinion stating that Haley's letter presented clear and convincing evidence of Shepard's position, which was accepted by the hearing examiners as proof of an outstanding record at Clinton. However, what occurred here was that the Regional Commissioner, the very same person who rejected the request for the subpoena, disavowed the findings of the hearing examiners who found an outstanding record. He found only that Shepard had a "good record" and that he was not to be released. Thus, Shepard's evidence was not clear nor convincing and without any independent documentary evidence other than Haley's letter before the Regional Commissioner, and with no opportunity to see Shepard (see 28 C.F.R. §2.24), the Commissioner rejected the finding as to the quality of the institutional performance.*

Since Shepard was denied the opportunity to prove by the best, and only complete record, his excellent record he was denied due process.

*There is no inconvenience to the Commission to issue these subpoenas. Indeed, the burden here was on New York state to supply the documents and the witness.

Point III

THE FAILURE OF THE PAROLE COMMISSION
TO DISCLOSE THE ENTIRE CONTENTS OF
THE FILE BEFORE THE HEARING EXAMINERS
REQUIRES A GRANT OF THE WRIT.

On February 22, 1977, after completion of the parole revocation proceeding in this case, and after a decision was rendered on the petitions for writs of habeas corpus, the Commission forwarded to counsel an additional letter disclosing that documents not previously disclosed to counsel as part of Shepard's file were in that file. The letter revealed that on December 20, 1976, the Commission had been sent a copy of the New York state presentence report. The memorandum of January 10, 1977 (Appendix L), also sent to counsel on February 22, establishes that not only was the presentence report in the file, but that it was one of the documents which formed the basis for denying access to the institutional report. Since counsel was unaware of the presence of the presentence report in the parole file, no request was made to examine it, either to the Commission or to the New York State authorities.

In another memorandum, dated December 17, 1976 (Appendix X), Mr. O'Connor advised officials at MCC that two additional sets of material were being sent to MCC for inclusion in the file. There was no indication as to what those papers were.

The failure to disclose these materials is both a constitutional and statutory violation. Morrissey v. Brewer,

supra, 408 U.S. 471; Carson v. Taylor, 540 F.2d 1156 (2d Cir. 1976); 18 U.S.C. §4214.

Of course, this issue was not presented to the district court because counsel was not aware at the time that the proceedings were before that court that the full record had not been disclosed. However, the issue is properly preserved on this appeal, since there can be no dispute that the presence of the documents in the file was not disclosed, although there was an obligation to disclose them. United States v. Badalamente, 507 F.2d 12, 18 (2d Cir.), cert. denied, 421 U.S. 911 (1975); Kloner v. United States, 535 F.2d 730 (1976) (where the entire parole file was undisclosed until after the main brief on appeal had been filed).

CONCLUSION

For the foregoing reasons, the orders of the district court should be reversed and the writs issued.

Respectfully submitted,

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April 13, 1977

I Certify a copy was
personally served on the
U.S.A- 5D.N.Y. Ats date.

April 13, 1977

Phyllis SKE 